

59514

ORIGINAL

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

DEPT. OF TRANSPORTATION
DOCKET
99 JUL 15 PM 4: 53

In the Matter of

PETITION FOR INTERPRETATION OF
COMPUTER RESERVATIONS SYSTEM
(CRS) REGULATIONS

Docket OST-99-5888 -4

In the Matter of

COMPUTER RESERVATIONS SYSTEMS
(CRS) REGULATIONS

Docket OST-97-2881 -119

REPLY OF
CONTINENTAL AIRLINES, INC.
AND MOTION FOR LEAVE TO FILE

Communications with respect to this document should be sent to:

Rebecca G. Cox
Vice President, Government Affairs
CONTINENTAL AIRLINES, INC.
1350 I Street, N.W.
Washington, DC 20005

Hershel I. Kamen
Staff Vice President, International
& Regulatory Affairs
CONTINENTAL AIRLINES, INC.
P.O. Box 4607 - HQSGV
Houston, TX 77210-4607

R. Bruce Keiner, Jr.
Lorraine B. Halloway
Thomas Newton Bolling
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 200042595
(202) 624-2500

Counsel for
Continental Airlines, Inc.

July 15, 1999

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

In the Matter of

PETITION FOR INTERPRETATION OF
COMPUTER RESERVATIONS SYSTEM
(CRS) REGULATIONS

Docket **OST-99-5888**

In the Matter of

COMPUTER RESERVATIONS SYSTEMS :
(CRS) REGULATIONS :

Docket **OST-97-2881**

REPLY OF
CONTINENTAL AIRLINES, INC.
AND MOTION FOR LEAVE TO FILE

Continental¹ strongly supports the Amadeus request that the Department prohibit tying corporate discount fares to the use of a particular CRS. Whether the Department acts now or in the CRS rulemaking proceeding,² it should prohibit all forms of tying airline marketing benefits and incentives, including discount fares, to the use of a particular CRS. Tying airline marketing benefits and incentives to CRS

¹ Common names of carriers are used.

² See Docket **OST-97-2881**.

July **15**, 1999

selection is so anticompetitive that the public benefits of banning the practice far outweigh any difficulty enforcing the prohibition.

Continental responds as follows to the answers of Delta and Worldspan:

1. Delta and Worldspan oppose the Amadeus petition because tying is a method used by Delta and Worldspan to restrict CRS competition. When Delta and Worldspan claim they want “the competitive marketplace, not . . . regulators,” to ensure the pro-competitiveness of the “commercial relationships and pricing decisions between airlines and their corporate accounts,”³ they really mean that they want to continue to force customers to subscribe to a particular CRS to obtain discounts instead of allowing customers to choose both CRSs and airline services on market factors such as price and quality. Notwithstanding Delta’s speculation about the possible difficulty of enforcing a prohibition, the Department could and should fashion effective enforcement mechanisms to allow customers to make free-market decisions on both CRS and airline services.

2. Contrary to suggestions by Delta and Worldspan, the Department can use its existing authority under Section **255.8** of the Department’s Regulations⁴ on subscriber contracts to prohibit CRS owners from requiring the use of a particular CRS to obtain a discount fare. Section 255.8(b) says “[n]o system may directly or indirectly impede a subscriber from obtaining or using any other system.” **(14**

³ Delta Answer at **5**; see also Worldspan Answer at 2.

⁴ See **14** C.F.R. Part **255**.

C.F.R. § **255.8(b)**) Tying impedes the ability of non-subscriber agents to compete since discount fares of considerable economic benefit are unavailable on their CRSs. Moreover, Section 255.8(c) says "[n]o system owner may require use of its system by the subscriber in any sale of its air transportation services." (**14** C.F.R. § 255.8(c)) Clearly, tying requires the use of a particular CRS to book corporate discount fares that are only offered on that system and violates this rule. While the Department did not include corporate discount fares in its 1992 prohibitions, its decision to exclude them was based only on the conclusion that these fares were not widely offered and thus not commonly available.⁵ That situation has changed, and today such fares are widespread. Tying discount fares to the use of a particular CRS is a powerful tool to restrict CRS competition in cities where the CRS airline owner is dominant. Tying can indirectly result in less airline competition in those cities. For example, Delta's dominance of Atlanta's air travel market and its extensive corporate discount fares for Atlanta deprive Atlanta-area travel agents of any real

⁵ The Department said, "Obviously a vendor's tactic of telling businesses that certain discount fares may be obtained only through its subscribers could be an effective means of using a dominant share of the local airline market as a tool for obtaining a larger share of the local CRS market. If the fare was widely available to corporations, this tactic would resemble an unlawful tying of discounted airline service and CRS usage . . . At this time we will not adopt a general prohibition against an airline's tying the availability of special corporate fares to use of its affiliated system for booking the fares. If, however, an airline widely offers a discount fare to businesses on the condition that they use its CRS for booking the fare, that would be a violation of the requirement that commonly available fares be made available to all systems." (57 Fed.Reg. 43801 (emphasis added))

choice among CRSs since customers demand these fares and they are only available on Worldspan. If all of Delta's corporate discount fares for Atlanta were available on all CRSs, Worldspan would be forced to compete with other CRSs on such market factors as price and quality. Delta maintains and enhances its dominant position with Atlanta-area travel agents to a significant extent through Worldspan's dominance of the local CRS market, which in turn reinforces Delta's dominance in the Atlanta air travel market. Clearly, these are the kind of anticompetitive results the Department's tying prohibitions were intended to eliminate through enforcement of the CRS rules.

3. Amadeus is correct on the merits in asserting that corporate tying should be outlawed. The Department should apply its existing prohibitions under Section **255.8** of the Department's Regulations to outlaw the practice of tying corporate discount fares to the use of a particular CRS or, alternatively, the Department should adopt a new rule requiring that fare discounts must be available in all CRSs and not tied to the use of a particular CRS.

For the foregoing reasons, Continental supports the Amadeus request that the Department prohibit the practice of tying fare discounts to use of a particular CRS.⁶

Respectfully submitted,

CROWELL & MORING LLP



R. Bruce Keiner, Jr.
rbkeiner@cromor.com



Lorraine B. Halloway
lhalloway@cromor.com



Thomas Newton Bolling
tbolling@cromor.com


Counsel for
Continental Airlines, Inc.

July 15, 1999

⁶ Continental moves for leave to file an otherwise unauthorized document pursuant to Rule 4(f) of the Department's Rules of Practice. This reply responds to arguments contained in the answers of Delta and Worldspan and corrects errors of law and fact in those answers. Acceptance of this reply will provide a more complete record on which the Department can base its decision and will not prejudice any party.

CERTIFICATE OF SERVICE

I certify that I have this date served the foregoing document on counsel for Delta and Worldspan and the parties served with their answers in the manner specified in the Department's Rules of Practice.



Thomas Newton Bolling

July **15**, 1999

1635529

SERVICE LIST (Docket OST-99-5888; OST 97-2881)

Reply of Continental Airlines and Motion for Leave to File

July 15, 1999

Page 1

Carl B. Nelson, Jr., Esq.
Associate General Counsel
American Airlines, Inc.
1101 17th Street, N.W.
Suite 1600
Washington, DC 20036

Audrey H. Rubin, Esq.
Vice President & General Counsel
Apollo Travel Services Partnership
2550 W Golf Road
Suite 900
Rolling Meadows, IL 60008

Paul M. Ruden, Esq.
Senior Vice President
American Society of Travel Agents
Legal and Industry Affairs
1101 King Street
Alexandria, VA 223142944

Mr. Carlos Chua
Commercial Director
Association of Asia Pacific Airlines
5/F Corporate Business Centre
151 Paseo de Roxas
1226 Makati City
Philippines

Mr. Richard S. Tirland
Director General
Association of Asia Pacific Airlines
5/F Corporate Business Centre
151 Paseo de Roxas
1226 Makati City
Philippines

Robert P. Silverberg, Esq.
Bagileo, Silverberg & Goldman, L.L.P.
1101 30th Street, N.W.
Suite 120
Washington, DC 20007

John K. Hawks, APR
President
Association of Retail Travel Agents
501 Darby Creek Road
Suite 47
Lexington, KY 40509-1604

Bruce E. Cunningham
Managing Director
Bauer & Cunningham, Inc.
Two Moonvine
The Woodlands, TX 77380-1331

Michael F. Goldman, Esq.
Bagileo, Silverberg & Goldman, L.L.P.
1101 30th Street, N.W.
Suite 120
Washington, DC 20007

Don Hainbach, Esq.
Boros & Garofalo, P.C.
1201 Connecticut Avenue, N.W.
Suite 700
Washington, DC 20036-2605

Jack Mannix
Managing Director, Travel Related Services
American Automobile Association
1440 New York Avenue, N.W.,
Suite 200
Washington, DC 20005

Constance O'Keefe, Esq.
Boros & Garofalo, P.C.
1201 Connecticut Avenue, N.W.
Suite 700
Washington, DC 20036-2605

SERVICE LIST (Docket OST-99-5888; OST 97-2881)

Reply of Continental Airlines and Motion for Leave to File

July 15, 1999

Page 2

Thomas J. Whalen, Esq.
Condon & Forsyth
1016 16th Street, N.W.
Suite 700
Washington, DC 20036

Carolyn F. Corwin, Esq.
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, DC 20044-7566

Gary Garofalo, Esq.
Boros & Garofalo, P.C.
1201 Connecticut Avenue, N.W.
Suite 700
Washington, DC 20036-2605

Aaron A. Goerlich, Esq.
Boros & Garofalo, P.C.
1201 Connecticut Avenue, N.W.
Suite 700
Washington, DC 20036-2605

David F. Rifkind, Esq.
Condon & Forsyth
1016 16th Street, N.W.
Suite 700
Washington, DC 200036

David W. Addis, Esq.
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, DC 20044-7566

Andre Auer
President
ECAC
3 bis, Vile Emile Bergerat
92532 Neuilly-sur-Sien Cedex

Arthur T. Voss, Esq.
Vice President and General Counsel
Frontier Airlines, Inc.
10215 E 46th Avenue
Denver, CO 80239

Joel Stephen Burton, Esq.
O'Melveny & Meyers LLP
555 Thirteenth Street, N.W.
Suite 500 West
Washington, DC 20004- 1109

Theodore Knappen
Government Affairs Representative
Greyhound Lines, Inc.
1001 G Street, N.W.
Washington, DC 20001-4545

Jonathan B. Hill, Esq.
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, DC 20036-6802

Fathy M. Attia
Egyptair
720 Fifth Avenue
New York, NY 10019

Robert Kneisley, Esq.
Associate General Counsel
Southwest Airlines, Inc.
1250 Eye Street, N.W.
Suite **1110**
Washington, DC 20005

Judith M. Trent
Global Aviation Associates, Ltd.
1800 K Street, N.W.
Suite 1104
Washington, DC 20006

SERVICE LIST (Docket OST-99-5888; OST 97-2881)

Reply of Continental Airlines and Motion for Leave to File

July 15, 1999

Page 3

Thomas L. Cooper, Esq.
President and Chief Executive Officer
Gulfstream International Airlines
P.O. Box 777
Miami Springs, FL 33266

Stephen L. Gelband, Esq.
Hewes, Gelband, Lambert & Dann, P.C.
1000 Potomac Street, N.W.
Suite 300
Washington, DC 20007

Lisa A. Harig Esq.
Hogan & Hartson, LLP
Columbia Square
555 13th Street, N.W.
Washington, DC 20004-1 109

Arthur J. Molins, Esq.
General Counsel, North America
Lufthansa German Airlines
1640 Hempstead Turnpike
East Meadow, NY 11554

Dennis Barnes, Esq.
Morgan, Lewis and Bockius
1800 M Street, N.W.
Suite 900 N
Washington, DC 20036

Donald T. Bliss, Esq.
O'Melveny & Meyers LLP
555 Thirteenth Street, N.W.
Suite 500 West
Washington, DC 20004-1109

George U. Carneal, Esq.
Hogan & Hartson LLP
Columbia Square
555 13th Street, N.W.
Washington, DC 200041109

Paul V. Mifsud, Esq.
Vice President, Government and Legal
KLM Royal Dutch Airlines
1201 Pennsylvania Ave., N.W.
Washington, DC 20004

John Kloster
Executive Director
Midwest Agents Selling Travel
15 Spinning Wheel Road
Suite 700
Washington, DC 20036

Megan Rae Poldy, Esq.
Managing Director, Government
Affairs and Associate General Counsel
Northwest Airlines, Inc.
901 15th Street, N.W.
Suite 310
Washington, DC 20005

Robert N. Duggan, Esq.
Pan American World Airways, Inc.
Pan American Airways Corp.
9300 N.W. 36th Street
Miami, FL 33178

James R. Weiss, Esq.
Preston Gates Ellis & Rouvelas Meeds
1735 New York Avenue, N.W.
Washington, DC 20006

Robert M. Rowen, Esq.
Vice President & General Counsel
Reno Air
P.O. Box 30059
Reno, NV 89520-3059

SERVICE LIST (Docket OST-99-5888; OST 972881)

Reply of Continental Airlines and Motion for Leave to File

July 15, 1999

Page **4**

Nathanial P. Breed, Jr., Esq.
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington, DC **20037**

Charles Donley, II, Esq.
Squire, Sanders & Dempsey
1202 Pennsylvania Avenue, N. W.
Suite 500
Washington, DC 20004

David Lambert
President
Preview Travel Online, Inc.
747 Front Street
San Francisco, CA 94111

Robert E. Cohen, Esq.
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington, DC 20037

James Parker, Esq.
Vice President & General Counsel
Southwest Airlines, Inc.
P.O.Box 36611
Dallas, TX 75235

Marshall S. Sinick, Esq.
Squire, Sanders & Dempsey
1202 Pennsylvania Avenue, N. W.
Suite 500
Washington, DC 20004

James V. Dick, Esq.
Squire, Sanders & Dempsey
1202 Pennsylvania Avenue, N.W.
Suite 500
Washington, DC 20004

Caren Cook Burbach
General Counsel
System One Amadeus, LLC
2929 Allen Parkway
Houston, TX 77019

Andrew B. Steiner, Esq.
Acting General Counsel
The SABRE Group, Inc.
4333 Amon Carter Boulevard,
MD 575
Fort Worth, TX 76155

Roger W. Fones, Esq.
Chief
Transportation, Energy &
Agriculture Section
U.S. Department of Justice
Antitrust Division
325 Seventh Street, N.W.
Washington, DC 20530

Randall Malin
General Manager
TravelNet
2630 Walsh Avenue
Suite 100
Santa Clara, CA 95051

William Diffenderffer, Esq.
President
System One Amadeus, LLC
2929 Allen Parkway
Houston, TX 77019

Darryl Jenkins
The Aviation Foundation
3712 Madison Lane
Falls Church, VA 22041

SERVICE LIST (Docket OST-99-5888; OST 97-2881)
Reply of Continental Airlines and Motion for Leave to File
July 15, 1999
Page 5

Richard Fahy, Esq.
Consulting Attorney
Trans World Airlines, Inc.
808 17th Street, N.W.
Suite 520
Washington, DC **20006**

Donna Kooperstein, Esq.
Assistant Chief
Transportation, Energy &
Agriculture Section
U.S. Department of Justice,
Antitrust Division
325 Seventh Street, N.W.
Washington, DC 20530

Joel I. Klein, Esq.
Acting Assistant Attorney General
U.S. Department of Justice,
Antitrust Division
325 Seventh Street, N.W.
Washington, DC 20530

John R. Read, Esq.
Transportation, Energy &
Agriculture Section
U.S. Department of Justice
Antitrust Division
325 Seventh Street, N.W.
Washington, DC 20530

Robert D. Swenson
President & Chief Executive Officer
Airtran Airlines, Inc.
4170 Wiley Drive
Orlando, FL 32827

James Campbell, Esq.
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, DC 20037-1420

Raymond J. Rasenberger, Esq.
Zuckert, Scoutt & Rasenberger, LLP
888 17th Street, N.W.
Suite 600
Washington, DC 20006

Paul Stephen Dempsey, Esq.
Professor of Law
University of Denver
1900 Olive Street
Denver, CO 80220

William C. Evans, Esq.
Verner, Liipfert, Bernhard, McPherson
and Hand, Chartered
901 15th Street, N.W.
Suite 700
Washington, DC 20005

John E. Gillick, Esq.
Winthrop, Stimson, Putnam & Roberts
1133 Connecticut Avenue, N.W.
Suite 1200
Washington, DC 20036

Charles D. Simpson, Esq.
Zuckert, Scoutt & Rasenberger, LLP
888 17th Street, N.W.
Suite 600
Washington, DC 20006

R. Bruce Wark, Esq.
4333 Amon Carter Blvd., MD5675
DFW Airport, TX 75261

Jack Foley, Esq.
Executive VP – Sales & Marketing
Aer Lingus Limited
538 Broad Hollow Road
Melville, NY 11747

SERVICE LIST (Docket OST-99-5888; OST **97-2881**)

Reply of Continental Airlines and Motion for Leave to File

July 15, 1999

Page 6

Sylvia de Leon, Esq.
Akin, Gump, Strauss, Hauer & Feld, LLP
1333 New Hampshire Avenue, N.W.
Washington, DC 20036

Francesco Gallo
Comptroller, North America
Alitalia
666 Fifth Avenue
New York, NY 10103-0030

John R. Degregorio, Esq.
700 11th Street, N.W.
Suite 600
Washington, DC 20001

Mary Lou Hennebry, Esq.
Telephone Sales & Automation Manager
Aer Lingus Limited
538 Broad Hollow Road
Melville, NY 11747

Alex Kogan, Esq.
Akin, Gump, Strauss, Hauer & Feld, LLP
1333 New Hampshire Ave., N.W.
Washington, DC 20036

Vittorio Martinelli
Distribution Supervisor
Alitalia
666 Fifth Avenue
New York, NY 10103-0030